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No. 83-1152

SUPREME COURT OF THE UNITED STATES

October Term, 1983

CHARLES X. BELL - - - - - - Petitioner

versus

CITY OF LOUISVILLE - - - - - Respondent

BRIEF FOR RESPONDENT, CITY OF LOUISVILLE, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE KENTUCKY COURT OF APPEALS

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February 10, 1984

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QUESTIONS PRESENTED

Has the Petitioner improperly failed to name as a party the Louisville-Jefferson County Board of Health, thereby violating Rule 19 of the Rules of the Supreme Court of the United States and causing this Court to be without jurisdiction over this matter?

Did the Petitioner fail to meet his burden of proof at trial on the issue of whether the action of the Louisville Civil Service Board in affirming the decision of the Louisville-Jefferson County Board of Health to terminate the Petitioner was arbitrary?

Did the Kentucky Court of Appeals deprive Petitioner, CHARLES X. BELL, of his constitutional right to due process of law by affirming the Jefferson, Kentucky Circuit Court's decision to uphold the termination of Petitioner by the Louisville-Jefferson County Board of Health?

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SUPREME COURT OF THE UNITED STATES

October Term, 1983

No. 83-1152

CHARLES X. BELL - - - - - *Petitioner*

v.

CITY OF LOUISVILLE - - - - *Respondent*

BRIEF FOR RESPONDENT, CITY OF LOUISVILLE, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE KENTUCKY COURT OF APPEALS

STATEMENT OF THE CASE

Petitioner, Charles X. Bell, was employed as a painter by the City of Louisville and Jefferson County Board of Health (hereinafter referred to as "Health Department") on January 3, 1978. He was dismissed from said employment on March 9, 1981. Pursuant to Section 90.190(1) of the Kentucky Revised Statutes, Petitioner appealed his dismissal to the City of Louisville Civil Service Board (hereinafter referred to as "Civil Service Board"), the City of Louisville agency charged with the duty of administering the classified service system for certain City of Louisville and joint City of Louisville and Jefferson County, Kentucky agencies, including, among others, the Board of Health.

Petitioner's Civil Service hearing was held on July 21, 1981. At that hearing, the Civil Service Board upheld Petitioner's dismissal by a vote of four to one. Petitioner appealed that decision to the Jefferson

Circuit Court. After a hearing held in that Court on February 19, 1982, the Department of Health's decision to terminate the Petitioner, Mr. Bell, was again upheld. The Petitioner then appealed to the Kentucky Court of Appeals and after weighing the evidence submitted and arguments presented, that Court also upheld, based upon the merits of the case, the Health Department's decision to terminate the Petitioner. The Kentucky Court of Appeals never reached a decision on the Motion of the City of Louisville to dismiss the appeal for procedural errors on the part of the Petitioner, to wit, his failure to properly name and serve all of the required parties to the action.

Of the two entities who were parties-defendant at the Jefferson Circuit Court level, the trial level, only the City of Louisville was named as a party-appellee in the Petitioner's Notice of Appeal to the Kentucky Court of Appeals. The Board of Health was not then named as a party-appellee nor was it ever named in any subsequent pleadings filed with the Court of Appeals, in spite of the fact that the Board of Health was named and treated as a party at the trial court level. Therefore, the appeal to the Kentucky Court of Appeals was clearly defective in its failure to join an indispensable party—the Board of Health.

This failure on the part of the Petitioner was compounded by a mistake — apparently clerical — on the Board of Health's part. In short, while the City of Louisville was the only party-appellee named in the Notice of Appeal, the Appellant's Brief was served *only* upon the Board of Health and *not* upon the City

of Louisville. Counsel for the Board of Health wrote, served, and filed a responsive brief in spite of the fact that his client had not been made a party-appellee. To further complicate matters, counsel for the Board of Health signed off on all pleadings which he filed as counsel for the City of Louisville. Of course, he was not ever authorized to act for the City of Louisville and presumably his action must be explained as a clerical oversight.

The failure of the Petitioner to make the Board of Health a party to the Appeal to the Kentucky Court of Appeals; the failure of the Petitioner to serve his Brief with the Kentucky Court of Appeals on the City of Louisville, whom he did make a party; and the Board of Health counsel's error in improperly stating his affiliation rendered this case a hopeless comedy of errors, resulting in prejudice to the only party who was not at fault at the Kentucky Court of Appeals level—the City of Louisville. The City of Louisville was never served with the Petitioner's Brief to the Kentucky Court of Appeals and thus assumed, until it received informal notice of oral arguments before the Kentucky Court of Appeals, that the Petitioner's appeal to the Kentucky Court of Appeals was ripe for dismissal.

A Motion To Dismiss was filed by the City of Louisville based upon the Petitioner's failure to comply with Kentucky Civil Rules 76.12(5) and (6) in that an indispensable party was not properly joined in the Kentucky Court of Appeals action. Those rules require service upon each adverse party to an appeal and re-

quire each Brief to bear on its front cover a statement by the attorney or party that service has been made as required. The Petitioner failed to comply with these explicit requirements in that a copy of his Brief to the Kentucky Court of Appeals was not served upon the City of Louisville or its counsel. Therefore, Kentucky Civil Rule 76.12(8)(a), which states that "a Brief may be stricken for failure to comply with any substantial requirement under this Rule 76.12" should have been applied by the Kentucky Court of Appeals to strike Petitioner's Brief to the Kentucky Court of Appeals and therefore render his Petition for Writ of Certiorari defective.

The Petitioner has taken this comedy of errors one step further and now files a Petition for Writ of Certiorari to the Kentucky Court of Appeals with the United States Supreme Court and has once again named only the City of Louisville as a Respondent. The Louisville-Jefferson County Board of Health is an indispensable party and one required by Rule 19.6 of the U. S. Supreme Court Rules to be included in the present action before this Court. His failure to so name the Board of Health renders his Petittion defective and the Court without jurisdiction.

Notwithstanding the procedural defects, the Petitioner contends that the hearing before the Louisville Civil Service Board was tainted as a result of a prehearing ex parte communication between the Chairman of the Louisville Civil Service Board and a Secretary to the Civil Service Board which resulted in the Chairman of the Civil Service Board requesting two armed

policemen to sit in the hearing room throughout the hearing.

It is readily admitted by the Respondent, City of Louisville, that at the hearing of the Petitioner's appeal before the Civil Service Board, two City of Louisville police officers were present in the room at the time of the hearing and were there at the request of the acting Chairman of the Louisville Civil Service Board, George Kinkead. Petitioner's "Statement of the Case" does not make clear, though, the fact that the communication which led to the acting Chairman's request for police presence came from an employee of the Louisville Civil Service Board and not from the Department of Health or any of its employees or its attorney. Therefore, there was no ex parte communication between the trier of fact, the Civil Service Board, and the Petitioner's adversary, the Department of Health.

Petitioner's contention that the Civil Service hearing was tainted and unfair because of the presence of police officers has been raised at every level of appeal in this matter. The response has been the same at every level as well, to wit, that no prejudice was visited upon the Petitioner as a result of the police presence.

ARGUMENT

I. The Petition for Writ of Certiorari Should Be Denied Because of Petitioner's Failure to Name as a Party the Louisville-Jefferson County Board of Health.

The Petition for Writ of Certiorari should be denied because the Petitioner fails to properly name

the Louisville-Jefferson County Board of Health as a party to this proceeding and is, therefore, in violation of Rule 19 of the U. S. Supreme Court Rules which requires, at Rule 19.6, that "[a]ll parties to the proceeding in the Court that judgment is sought to be reviewed shall be deemed parties in this Court. . . ."

The Kentucky Court of Appeals refused to enter final judgment in an action since a County was not joined as a party in *White* v. *Walker,* 10 S. W. 2d 1071, 226 Ky. 326 (1928). Furthermore, the Court said that if a judgment cannot be entered without prejudice to others, the case must be dismissed or joinder required. *Klene* v. *Campbell,* 213 S. W. 520 (Missouri 1919), also held that there shall be a Judgment of Dismissal when a Defendant is not served. In the case *sub judice*, the failure to serve the City of Louisville caused it to lose its status as a party to the action. Therefore, no Judgment entered can bind the City.

The failure to join as parties those whose interests would be affected by the Judgment was termed an "inescapable object" to the disposition of the case by the Court in *Buckner* v. *Clay,* 206 S. W. 2d 827, 306 Ky. 194 (1947). This case involved a taxpayer's challenge to a city's right to increase the assessment of real and personal property for City tax purposes without prior notice to that taxpayer. The Kentucky Court proceeded to define indispensable parties "as those who have such an interest in the subject that judgment cannot be made without affecting their interests."

It is obvious that the City of Louisville and the Board of Health are indispensable parties to the pres-

ent action. The failure to join the Board of Health under Rule 19.6 of the U. S. Supreme Court Rules and the Petitioner's failure in the Kentucky Court of Appeals to comply with Kentucky Rules of Court 76.12 (5) and (6), renders this Petition defective and the Court without jurisdiction.

A Court Order affecting only the City of Louisville in this matter would be hollow; the City of Louisville has no authority to act independently of the Board of Health; the Board of Health is not a City of Louisville agency nor is it funded entirely by City of Louisville funds. See § 212.350 *et seq.* of the Kentucky Revised Statutes. The City of Louisville Civil Service Board acts for the Board of Health in administering only very specific functions regarding certain Board of Health employees, while some Board of Health employees are excluded entirely from the Civil Service Board's authority. See §§ 90.150(1) and (2) of the Kentucky Revised Statutes. In fact, the City of Louisville Civil Service Board became involved in this matter only because of its authority to act as a reviewing body in the event of an appeal of a termination by a Board of Health employee. *See* § 90.190(1) of the Kentucky Revised Statutes. Therefore, failure to join the Board of Health as a party to this action is tantamount to appealing to an appellate court and leaving the argument to uphold the trial court's decision not up to the appealing party's trial level opponent, but up to the trier of fact, the Judge or Court, only.

II. Petitioner Failed to Meet His Burden of Proof on the Issue of Whether the Action of the Louisville Civil Service Board in Affirming the Decision of the Louisville-Jefferson County Board of Health to Terminate the Petitioner was Arbitrary.

The Petitioner has consistently failed to meet his burden of demonstrating that the Civil Service Board decision was arbitrary.

The Supreme Court of Kentucky has clearly structured the framework for public employee discharge appeals to Circuit Court in the case of *Brady* v. *Pettit*, Ky., 586 S. W. 2d 29 (1979). Therein, the Kentucky Court placed the burden of proving that the administrative agency acted arbitrarily upon the appealing party. The Petitioner is in agreement with this principle for in his brief to the Jefferson County Court, he stated as follows:

> It is well-established in civil cases that it is the duty of a party on [sic] whom the burden of proof rests to produce evidence which furnishes a reasonable basis for sustaining his claim. . . . Thus, Mr. Bell must show by a preponderance of the evidence that his claim that the Board acted arbitrarily is indeed valid. It is, of course, the burden of the Petitioner to demonstrate that the Civil Service Board acted arbitrarily in that its decision was not supported by substantial evidence. *American Beauty Homes Corp.* v. *Louisville and Jefferson County Planning & Zoning Commission*, Ky., 379 S. W. 2d 450 (1964).

It is clear from the record of the Civil Service Board hearing that there was ample evidence presented

against the Petitioner upon which the Civil Service Board's decision to uphold the Health Department's decision to terminate could be based. The hearing record reflects testimony of the Petitioner's supervisor and other employees of the Health Department that the Petitioner verbally assaulted and intimidated a young secretary working for another City of Louisville department because she would not comply with Petitioner's request to her to deviate from the procedure she was instructed to use in matters involving purchasing or procurement; that Petitioner had been belligerent with this employee on previous occasions; that Petitioner provoked a verbal confrontation with a clerk-typist employed by the Board of Health; that Petitioner had behaved in a subordinate manner with his supervisor and that Petitioner had been found absent from his assigned work site but had falsified weekly activity reports to indicate otherwise. In short, the record in this matter is replete with evidence that the Petitioner's conduct as an employee of the Department of Health was unsatisfactory.

III. The Petition for Writ of Certiorari Should be Denied Because There Was No Denial of Due Process to the Petitioner in the Manner in Which the Civil Service Hearing was Conducted.

Evidence was adduced at the trial of this matter before the Jefferson Circuit Court that, while the acting Chairman of the Civil Service Board did, in fact, request police presence at the hearing, it was not at all unusual to have police officers present at Civil Service Board meetings or hearings. Police officers

are classified service employees of the City of Louisville and their representatives make it a practice to spend almost as much time in the Civil Service Board meeting and hearing room as do Civil Service Board members. The acting Chairman also testified that he did not discuss with any of the other Civil Service Board members the presence of the police, the reasons therefor, or Mr. Bell's past personnel record prior to the close of the hearing and the vote to uphold the decision of the appointing authority, the Health Department, to terminate the Petitioner. In fact, it was the Acting Chairman's testimony that, as far as he knew, the other Board members were not even aware that the police officers were present.

It was also testified to by the acting Chairman of the Civil Service Board that he judged the Petitioner, Mr. Bell, only on the evidence and that he was not prejudiced by the information concerning the Petitioner which caused him to request police presence. There is nothing in the record to indicate that either the Chairman of the Board treated the Petitioner any differently than anyone else and no evidence was adduced that the presence of the police officers affected the vote of the Board members or that the members would have voted differently without the presence of the officers.

Moreover, the vote of the Civil Service Board to uphold the termination decision was by a count of four to one. At the hearing on this matter in the Jefferson Circuit Court, the Petitioner, Mr. Bell, subpoenaed only the acting Chairman of the Civil Service Board

to testify. None of the other four Board members who participated in this case at the administrative level were asked or required to testify. The Petitioner has admitted throughout these proceedings that he has the burden of proof to show that the action of the Board was arbitrary. In order to demonstrate arbitrariness on the issue of police presence and the alleged prejudice resulting therefrom, the Petitioner's burden should require that he introduce the testimony of at at least a majority of the Civil Service Board members so that it could be determined that those members were aware of the presence of the police officers and of the reason for their presence and were affected thereby. Testimony of such a majority is necessary because a majority vote is needed to uphold or overturn the decision of the appointing authority. Therefore, the Petitioner falls far short of meeting his burden of proving that the presence of the police officers affected the votes of the Board members or that the members would have voted differently were it not for the presence of the police officers.

Petitioner has cited two cases in support of his argument that the Civil Service Board acting Chairman's request for police presence at the hearing so tainted the hearing as to deprive the Petitioner of his constitutional right to "property interests, right to a fair hearing, and liberty to retain employment." Those cases, *Jarett* v. *United States*, 451 F. 2d 623 (U. S. Court of Claims 1971), and *Camero* v. *United States*, 375 F. 2d 777 (U. S. Court of Claims 1967) are distinguished by fact situations vastly different than that

in the instant case. The latter case, *Camero, Id.* at 780, was decided for the Appellant, a United States classified service employee, because *his adversary's attorney* engaged in an ex parte communication concerning *the merits of the case* with those responsible for making a decision on the Appellant's appeal from termination of employment.

The former case cited by Petitioner, *Jarett* v. *United States,* 451 F. 2d at 629, indicates that the Appellant in that case, also a United States classified service employee, was granted a favorable decision by the Court of Claims because of that Court's determination that ex parte communications were considered in making an employment decision concerning the Appellant, in violation of specific requirements to the contrary, and that prejudice to the appealing employee definitely resulted.

In the case *sub judice* there was no proof to indicate either that any ex parte communications were *considered* by the Civil Service Board members *or* that prejudice resulted to the Petitioner from any ex parte communications to the Civil Service Board. In fact, as has been stated hereinabove, there was no true ex parte communication in this case at all. The communication to the acting Chairman of the Civil Service Board resulting in the request for police presence was made by a member of the acting Chairman's own Civil Service Board staff, the secretary of the Board, and not by a representative or employee of the Petitioner's adversary, the Department of Health.

SUMMARY

The Respondent, City of Louisville, bases its request for a denial of the Petition for Writ of Certiorari on three factors.

First, the Petition for Writ of Certiorari should be denied because of the Petitioner's failure to name as a party the Louisville-Jefferson County Board of Health. This failure is in violation of Rule 19.6 of the U. S. Supreme Court Rules and leaves the Court without jurisdiction in this matter.

Second, the Petitioner has failed to meet his burden of proof on the issue of whether the action of the Louisville Civil Service Board in affirming the Louisville-Jefferson County Board of Health to terminate the Petitioner was arbitrary. The record in this matter is replete with evidence upon which the Health Department's decision to terminate could be based.

Third, and finally, the Petition for Writ of Certiorari should be denied because there has been no denial of due process to the Petitioner in the manner in which the Civil Service hearing was conducted. Again, there is ample evidence in the record to reflect complete fairness in the conduct of the hearing by the Civil Service Board and no evidence to indicate that the Civil Service Board was prejudiced by the presence of police officers at the hearing or by any comments which may have been made to the Acting Chairman of the Louisville Civil Service Board by one of his staff members.

CONCLUSION

For the reasons reviewed in this Brief, the Petition for Writ of Certiorari to review the Judgment and Opinion of the Kentucky Court of Appeals should be denied.

Respectfully submitted,

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PROOF OF SERVICE

I, Mark W. Dobbins, having first been duly sworn, state that copies of the foregoing Brief In Opposition To Petition for Writ of Certiorari were mailed, first class, postage prepaid, to John Swain, Goldberg & Simpson, PSC, First National Tower, Louisville, KY 40202, Counsel for Louisville-Jefferson County Board of Health; Cecil A. Blye, Sr., 247 S. Shawnee Terrace, Louisville, KY 40212, Counsel for Petitioner Bell, on this the 9th day of February, 1984. I further state that to my knowledge all parties required to be served have been served. I do further state that I have duly applied for permission to practice before the Supreme Court of the United States and am awaiting notification of action on my application by the Court.

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State of Kentucky
County of Jefferson } SS

Subscribed and sworn to before me by MARK W. DOBBINS this 10th day of February, 1984.

My Commission expires: August 3, 1987

Sandra Powell
Notary Public, State at Large, Ky.

I, James H. Highfield, having been admitted to practice before the Supreme Court of the United States, do hereby certify that I have knowledge that the foregoing Affidavit of Service of Mark W. Dobbins, Counsel for Respondent, City of Louisville, is true and correct, and that copies of the foregoing Brief In Opposition of Petition for Writ of Certiorari were duly mailed, in numbers required, to all counsel of record as sworn above on this the 10 day of February, 1984.

James H. Highfield
JAMES H. HIGHFIELD

PROOF OF TIMELY FILING

I, James H. Highfield, having been admitted to practice before the Supreme Court of the United States, do hereby certify that forty (40) copies of the foregoing Brief In Opposition of Petition of Writ of Certiorari have been timely filed by depositing same in a United States Post Office or mailbox, with first-class postage prepaid, properly addressed to the Hon. Alexander Stevas, Clerk, United States Supreme Court, on February 10th, 1984, within the time allowed for filing the Brief, and I, after having been duly sworn, state that the mailing took place at an office of the U. S. Post Office on said day within time permitted for said filing.

James H. Highfield

JAMES H. HIGHFIELD

State of Kentucky
County of Jefferson } SS

Subscribed and sworn to before me by JAMES H. HIGHFIELD this 10th day of February, 1984.

My Commission expires: July 27, 1986

Jonathan C. Hardy

Notary Public, State at Large, Ky.